

TITLE 9 HUMAN RIGHTS
CHAPTER 4 PERSONS WITH DISABILITIES
PART 21 GUARDIANSHIP SERVICES

9.4.21.1 ISSUING AGENCY: New Mexico Developmental Disabilities Planning Council Office of Guardianship (NMDDPC office of guardianship).
[9.4.21.1 NMAC - N, 04/14/2006]

9.4.21.2 SCOPE: These rules apply to all New Mexico residents and other New Mexico state agencies requesting guardianship services from the NMDDPC office of guardianship and other private businesses that contract directly with the NMDDPC office of guardianship to provide guardianship services.
[9.4.21.2 NMAC - N, 04/14/2006]

9.4.21.3 STATUTORY AUTHORITY: Section 28-16B-1 through 28-16B-6 NMSA 1978 permits the NMDDPC office of guardianship to promulgate rules in accordance with the State Rules Act to carry out the provisions of the Office of Guardianship Act.
[9.4.21.3 NMAC - N, 04/14/2006]

9.4.21.4 DURATION: Permanent.
[9.4.21.4 NMAC - N, 4/14/2006]

9.4.21.5 EFFECTIVE DATE: April 14, 2006, unless a later date is cited at the end of a section.
[9.4.21.5 NMAC - N, 4/14/2006]

9.4.21.6 OBJECTIVE: The objective of this rule is establish standards for the provision of guardianship services to income and resource eligible incapacitated adults who are residents of the state of New Mexico, when there are no lesser forms of intervention, such as a power of attorney or surrogate decision maker, available, and to monitor contracts that provide guardianship services.
[9.4.21.6 NMAC - N, 4/14/2006]

9.4.21.7 DEFINITIONS: The following words and terms when used in this part shall have the following meanings unless the context clearly indicates otherwise.

A. "Complaint" means an allegation of wrong doing by a contractor or a violation of the contract with the office of guardianship and the contractor, including but not limited to:

- (1) failure to provide appropriate services;
- (2) violations of the civil rights of the wards; and
- (3) abuse, neglect or exploitation of the ward.

B. "Court" means the district court or family division of the district court where such jurisdiction is conferred.

C. "Contractor" means an entity under a contract with the NMDDPC office of guardianship to provide some type of guardianship service; i.e., attorneys, court visitors, or guardians.

D. "Emergency" means any situation in which the physical or mental condition, health status or safety of an incapacitated person is at significant risk due to the unavailability of a substitute decision maker.

E. "Functional impairment" means an impairment that is measured by a person's inability to manage his/her personal care or the person's inability to manage his/her estate or financial affairs or both.

F. "Grievance" means an allegation of wrongdoing by the office of guardianship or its staff, including but not limited to:

- (1) failure to appropriately monitor and supervise contractors;
- (2) violations of the due process rights of the ward or contractor; and
- (3) failure to comply with complaint procedures as set forth herein.

G. "Guardian" means a person who has qualified to provide for the care, custody or control of the person of an incapacitated person pursuant to testamentary or court appointment, but excludes one who is a guardian ad litem.

H. "Guardian ad litem" means an attorney appointed by the court to represent and protect the interests of an incapacitated person in connection with litigation or any other court proceeding.

I. "Incapacitated person" means any person who is found by a court to be impaired to the extent

that he/she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person or management of his/her affairs.

J. “Inability to manage his/her personal care” means the inability, as evidenced by recent behavior, to meet one's needs for mental or physical health treatment or care resulting in personal neglect of medical care, nutrition, shelter, hygiene or safety so that physical injury, illness or disease has occurred or is likely to occur in the near future.

K. “Interested person” means any person who has an interest in the welfare of the alleged incapacitated adult to be protected, and may include the NMDDPC office of guardianship.

L. “Least restrictive form of intervention” means only those limitations necessary to provide the needed care and rehabilitative services, and that the adjudicated incapacitated adult shall enjoy the greatest amount of personal freedom and legal rights.

M. “Letters” means letters of guardianship, which provide proof that the guardian of the adjudicated incapacitated adult is a court appointed guardian.

N. “Limited guardian” means a guardian appointed by the court to exercise limited authority for the incapacitated person as specified in the court order.

O. “Limited Guardianship” means the court shall appoint a limited guardian if it determines that the incapacitated person is able to manage some but not all aspects of his/her personal care. The court shall specify those powers that the limited guardian shall have and may further restrict each power so as to permit the incapacitated person to care for himself commensurate with his/her ability to do so. A person for whom a limited guardian has been appointed retains all legal rights except those that have been specifically granted to the limited guardian by the court.

P. “Petitioning attorney” means the attorney who files a petition on behalf of the interested person and represents the interested person and identifies the proposed guardian.

Q. “Plenary guardian” or “full guardian” means a guardian appointed by the court to exercise all legal rights and powers of the incapacitated person after the court has found that the incapacitated person lacks the capacity to carry out all the tasks necessary to care for his or her person.

R. “Plenary guardianship” or “full guardianship” means the most restrictive form of guardianship and is authorized by a court only when an alleged incapacitated person is found to lack capacity to carry out all of the tasks necessary to care for his or her person and only after less restrictive options have been ruled out.

S. “Power of attorney (POA)” means a document created while a person (principal) has capacity, which grants revocable authority to another person (agent) to act on behalf of the principal in specified areas.

(1) **“Durable POA”** means the document has language which indicates that it will not be affected by any subsequent incapacity of the principal. Thus, it is considered to be a durable power of attorney.

(2) **“Springing POA”** means the document contains language which indicates that it only becomes effective upon the incapacity of the principal. Thus, it is considered to be a springing power of attorney.

T. “Contracted guardianship providers” means some private/public entity under contract with the NMDDPC office of guardianship to act as guardian for an adjudicated incapacitated person who has no family or friends willing, able and appropriate to be his/her guardian.

U. “RFP” means the request for proposal which is the process under State Procurement Code where an individual or other non-state agency entity may be awarded a contract to provide services.

V. “Substitute judgment” means the standard of decision making for guardians of adults that requires the guardian to ascertain what the decision would have been if the ward were able to make the decision themselves and then make the decision based upon that knowledge.

W. “Surrogate decision maker” means the individual authorized by the Uniform Health Care Decisions Act to make health care decisions for a patient.

X. “Temporary guardian” means a person appointed by the court at an expedited hearing to serve as guardian for an alleged incapacitated person. The temporary guardian has specific powers granted by the court to prevent harm to the alleged incapacitated person during the time of his or her appointment.

Y. “Temporary guardianship” means that when a petition for guardianship has been filed alleging that immediate and irreparable harm will result to the alleged incapacitated person if the normal notice and time requirements of a guardianship proceeding are kept and the court may appoint a temporary guardian for the alleged incapacitated person without notice to the alleged incapacitated person. The temporary guardianship shall last not more than sixty days although the court can extend the guardianship for an additional thirty days. A hearing shall be held to determine whether the guardianship will be permanent.

Z. “Testamentary guardian” means a guardian appointed by will or other writing of a parent or spouse guardian pursuant to the procedures outlines in NMSA 45-5-301.

AA. “Testamentary guardianship” means a guardianship that is passed from a spouse or parent guardian to another person through a will or other writing pursuant to the procedures outlined in NMSA 45-5-301.

BB. “Treatment guardian” means a person, appointed by the court pursuant to the Mental Health and Developmental Disabilities Code (NMSA Section 43-1-15), who can make substitute decisions for an incapacitated person regarding mental health treatment, including the use of psychotropic medications, for a specified period of time, not to exceed one year per court appointment.

CC “Treatment guardianship” means a form of guardianship tailored to grant the guardian authority to make decisions regarding mental health treatment for individuals determined by the court to lack the capacity to provide informed consent for mental health treatment.

DD. “Qualified health care professional” means a physician, psychologist, nurse practitioner or other health care practitioner whose training and expertise aid in the assessment of functional impairment;

EE. “Visitor” or “court visitor” means a person who is an appointee of the court who has no personal interest in the proceeding and who has been trained or has the expertise to appropriately evaluate the needs of the person who is allegedly incapacitated. A "visitor" may include, but is not limited to, a psychologist, social worker, developmental incapacity professional, physical and occupational therapist, an educator and a rehabilitation worker.

FF. “Ward” means an incapacitated person for whom a guardian has been appointed.
[9.4.21.7 NMAC - N, 4/14/2006]

9.4.21.8 ELIGIBILITY:

A. The alleged incapacitated person must be eighteen (18) years old to qualify for services from the NMDDPC office of guardianship.

B. The alleged incapacitated person must be financially eligible for institutional Medicaid.

C. The alleged incapacitated person must be a legal resident of New Mexico

D. The alleged incapacitated person must be recently assessed by a qualified health care provider who shall submit a report in writing to the court which:

(1) describes the nature and degree of the alleged incapacitated person’s incapacity , if any, and the level of the alleged incapacitated person’s intellectual, developmental and social functioning; and

(2) observations, supporting data, regarding the alleged incapacitated person’s ability to make health care decisions and manage the activities of daily living. NMSA Section 45-5-303D (1993)

[9.4.21.8 NMAC - N, 4/14/2006]

9.4.21.9 PRIORITIZATION OF SERVICE:

A. In general, service will be provided based on the date of application.

B. When service requests exceed capacity or availability, individuals in the categories noted in Subparagraph C, below will be prioritized to receive the first available services, as appropriate.

C. Priority categories (all have equal prioritization):

(1) adult protective services (APS) referrals;

(2) Jackson class members;

(3) emergencies, with no family members or friends willing, able and appropriate to serve as guardian;

(4) military veterans.

[9.4.21.9 NMAC - N, 4/14/2006]

9.4.21.10 DESIGNATION OF SERVICE AREA: Services are to be provided statewide through the judicial districts. Petitions for guardianship in the state of New Mexico must be filed in the judicial district where the alleged incapacitated person resides. The NMDDPC office of guardianship recognizes the individual sovereignty of each tribe and pueblo in the state of New Mexico.

[9.4.21.10 NMAC - N, 4/14/2006]

9.4.21.11 SERVICES TO BE PROVIDED BY THE NMDDPC OFFICE OF GUARDIANSHIP:

A. The provision of probate code guardianship services to income eligible, incapacitated persons as follows:

(1) contracting with attorneys to petition for the appointment of probate code guardians;

(2) contracting with entities/individuals to serve as probate code guardians;

(3) contracting with entities/individuals to serve as probate code guardians;

(4) contracting with visitors (court visitors) in probate code proceedings;

- (5) contract with attorneys to serve as guardian ad litem in probate court proceedings;
 - (6) identifying available persons to serve as mental health treatment guardian;
 - (7) contract to provide for recruitment and training for persons interested in serving as mental health treatment guardians;
 - (8) providing information regarding the duties and responsibilities of probate code guardianship, including less restrictive alternatives; and
 - (9) investigating and addressing complaints made against the office of guardianship contractors.
- B.** The provision of recruitment and training for persons interested in serving as guardians.
- C.** The provision of information regarding the duties and responsibilities of guardianship, including less restrictive alternatives.
- D.** The provision of investigative measures/ processes to address complaints made against entities providing contracted guardianship services.
- [9.4.21.11 NMAC - N, 4/14/2006]

9.4.21.12 REQUIREMENTS OF CONTRACTED GUARDIANSHIP PROVIDERS:

- A.** meet RFP Requirements when published;
 - B.** meet office of guardianship requirements including but not limited to;
 - C.** comply with all the terms of one's contract;
 - D.** agree to be paid at the state approved rate;
 - E.** must comply with the Caregivers Criminal History Screening Act (See NMSA, 1978 29-17-2);
 - F.** must become a registered guardian within 18 months after the award of a contract;
 - G.** assure the civil rights of the incapacitated persons;
 - H.** guarantee access to all records on incapacitated persons assigned through the office of guardianship; and
 - I.** comply with the office of guardianship individual caseloads, standards of practice and ethics.
- [9.4.21.12 NMAC - N, 04/14/2006]

9.4.21.13 REFERRAL PROCESS: Any person interested in the well being of an alleged incapacitated person, and seeking guardianship services to be paid for by the NMDDPC office of guardianship must call or complete a referral process form from NMDDPC office of guardianship.

[9.4.21.13 NMAC - N, 04/14/2006]

9.4.21.14 COMPLAINTS AGAINST A CONTRACTED PROVIDER WITH THE OFFICE OF GUARDIANSHIP:

- A.** A complaint shall be made in writing by the client or another person on behalf of the client, including but not limited to a friend, relative, advocate, or other interested person, such as a caregiver or provider. An exception to the requirement that a complaint shall be made in writing shall be made if a reasonable accommodation is necessary.
- B.** With the exception set forth in Subsection E of 9.4.21.14 NMAC, below, all individuals registering a complaint shall first try and resolve their complaints against a contracted provider with the office of guardianship.
- C.** If the complaining party and contractor are unable to reach a resolution or agreement then the complaining party may file a complaint with the office of guardianship and may file a copy with the contractor.
- D.** Complaining parties may file a simultaneous compliant against a contractor with the office of guardianship. The office of guardianship may choose to postpone intervention pending completion of the contractor's grievance process.
- E.** Exceptions shall be made to Subsections A & B of 9.4.21.14 NMAC when the office of guardianship has reason to believe that an emergency situation exists or that a delay of the investigation could result in harm to the ward or retaliation by the contractor.
- F.** The complaint should include as much information as possible, including the following:
 - (1) name of the incapacitated person;
 - (2) name of the contact information for the individual making the complaint on behalf of the incapacitated person;
 - (3) relationship of the complaining party to the incapacitated person;
 - (4) name of the individual contractor against whom the complaint is being made;
 - (5) name of the party who has attempted to resolve the complaint, if known;

(6) details of the complaint including the alleged wrongdoing, the involved parties and when and where the wrongdoing occurred;

(7) where sufficient information is provided to allow the office of guardianship to continue the investigation, the office of guardianship will make further inquiries if possible or discontinue the investigation; justification for closure of investigations based on insufficient information will be documented.

G. The complaint made to the office of guardianship may be submitted by mail or fax unless a reasonable accommodation is necessary.

H. In order to preserve the confidentiality of the incapacitated person, the complaint shall be submitted to: The NMDDPC Office of Guardianship; 810 W. San Mateo, Ste. C; Santa Fe, NM 87505-4144; (505) 476-7324; (505) 476-7322 (Fax).

I. Upon receipt of a verbal or written complaint, the office of guardianship shall:

(1) acknowledge receipt of a the complaint in writing;
(2) notify all parties involved; and
(3) initiate an investigation within 15 working days of the filing of the complaint with the office of the guardianship.

J. A determination decision shall be made within 60 working days after the complaint is filed with the office of guardianship unless a shorter time frame is required to protect the ward.

K. A determination decision shall include:

(1) the decision made;
(2) the basis for the decision;
(3) notice of the complaining party's right to grieve the actions taken by the office of guardianship related to the investigational process pursuant to 9.4.21.15 NMAC.
(4) further actions to be taken by the office of guardianship and the contractor which may include, but shall not be limited to:

(a) the institution of a corrective action plan and the contractor; and
(b) a referral of the complaint to other agencies for investigation and prosecution.

L. Persons objecting to the process of the complaint investigation taken by the office of guardianship may file a grievance against the office of guardianship with the New Mexico human services department pursuant to 9.4.21.15 NMAC below.

M. None of these regulations restrict the due process rights of an individual to request a less restrictive guardianship or to overturn the decision of a guardianship contractor or the office of guardianship through a court of law.

[9.4.21.14 NMAC - N, 04/14/2006]

9.4.21.15 GRIEVANCES AGAINST THE OFFICE OF GUARDIANSHIP: Grievances against the office of guardianship or a staff member of the office of guardianship shall be filed with and investigated by the human services department, by sending a complaint in writing directly to the secretary of human services department with a copy sent to the director of the office of guardianship. (NMSA 2003 28-16B-6E)
[9.4.21.15 NMAC - N, 04/14/2006]

9.4.21.16 TRANSFER OF WARD FROM A PRIVATE PAY GUARDIANSHIP TO A PROGRAM FUNDED THROUGH THE OFFICE OF GUARDIANSHIP:

A. Purpose: It is not the intention of the office of guardianship to create a hardship on any private pay provider of guardianship services in cases where resources are being exhausted, but in order to work in a more collaborative fashion these procedures are being developed to move the private pay wards into the state funded program under the office of guardianship in a timely and reasonable manner to minimize the impact on the ward

B. Requirements: In order to affect a ward's transfer to a program funded through the office of guardianship, the private pay guardianship must do the following:

(1) obtain a request for transfer form from the office of guardianship and fill it out completely (failure to do so will result in delay of transfer);

(2) the filing of the request for transfer from with the office of guardianship does not guarantee the request will be granted;

(3) to be eligible for transfer into this program, a ward must meet the standards for qualifying for institutional medicaid and medicaid in New Mexico, (if appropriate);

(4) appropriate residential placement must be secured by the private pay guardians for the ward prior to transfer to office of guardianship;

- (5) all medical information regarding the ward must be provided to the new guardian for the state;
 - (6) any original legal documents such as birth certificates, social security cards, medicaid cards, etc. shall be turned over to the new guardian upon appointment;
 - (7) legal fees for the transferring of the case must be paid by the private provider (this would include the closing of the conservatorship);
 - (8) if the ward has a conservatorship and no assets, then the conservatorship must be closed prior to transfer; if the conservatorship cannot be closed for some appropriate reason, then a complete accounting must be given to the office of guardianship at the time of transfer;
 - (9) there must be a burial policy for the ward; ownership is to be transferred by the private provider to the office of guardianship's appointed guardian;
 - (a) these transfers will not be given any priority status;
 - (b) the private pay provider will agree to cooperate with the new guardian on matters, including, but not limited to, providing any information the state provider might need, which may be in the possession of the private guardian;
 - (10) these transfers will be effectuated according to NMSA 1978 Section 45-5-307.
- [9.4.21.16 NMAC - N, 04/14/2006]

9.4.21.17 REQUESTS FOR INFORMATION:

- A.** Any requests for non-confidential information will be treated as a request for inspection of public records under the state inspection of public records act. (NMSA 1978, Section 14-2-1 through 14-2-12).
 - B.** Any requests for confidential information or client specific information will be handled according to state and federal law. (NMSA 2003 28-16B-4B).
- [9.4.21.17 NMAC - N, 04/14/2006]

HISTORY OF 9.4.21 NMAC: [RESERVED]